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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 WESCO INSURANCE COMPANY,  
4 et al.,

Plaintiffs,

5 v.

18 CV 3771 (PGG) (OTW)

Remote Conference

6 PERSONNEL STAFFING GROUP, LLC,

7 Defendant.

8 -----x

9 New York, N.Y.

10 March 2, 2021

11:00 a.m.

11 Before:

12 HON. ONA T. WANG,

13 Magistrate Judge

14 APPEARANCES

15 FREEBORN & PETERS LLP  
Attorneys for Plaintiffs

16 BY: ANDREW J. COSTIGAN

17 SPERLING & SLATER PC  
Attorneys for Defendant

18 BY: NATHAN ANDREW SHEV

-and-

19 TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP

20 BY: CARL FREDERICK REGELMANN

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(The Court and all parties appearing telephonically)

(Case called)

MR. COSTIGAN: This is Andrew Costigan, appearing for the plaintiffs.

MR. SHEV: This is Nathan Shev, appearing for Defendant PSG.

MR. REGELMANN: This is Carl Regelmann, for Defendant PSG.

THE COURT: All right. Good morning, everyone.

We are here for a status conference. We are proceeding by telephone due to the COVID-19 pandemic. This is a public line and should be treated like my virtual courtroom. I expect the same decorum on the line that I expect in my courtroom, although, having had several settlement conferences with you all, I don't expect this to be a problem with you. And because this is a public line, we should all expect that members of the press or public may be on the line on a listen-only basis.

We do have a court reporter on the line; that is Mr. Walker. He may interrupt from time to time if he can't hear you or if somebody is speaking too quickly. And at the end of the conference, I am going to request that the parties order a copy of the transcript and share the cost so that we can all literally be on the same page.

As Mr. Walker may have let you know, but I will remind

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1 you all, any recording or rebroadcasting by anyone else on this  
2 line is strictly prohibited. Please stay on mute when you're  
3 not talking so that we have as clear a transcript as possible.  
4 Please say your name when you start speaking, and, obviously,  
5 please don't interrupt each other.

6 I will also add, although this may not be the case  
7 with today's conference, that I do generally encourage junior  
8 or less experienced attorneys to speak, and I place no limit on  
9 the number of attorneys who can speak at the conference.

10 We had held several settlement calls last fall and  
11 this winter, until it became clear that the parties may need  
12 some more discovery before potentially talking about settlement  
13 again or in order to move forward in the case on its merits.

14 I have reviewed your joint status letter, and there  
15 seemed to be globally two issues. One is whether, and how  
16 much, discovery should be taken from PSG, who's the defendant,  
17 and the breadth and the scope of the anticipated subpoenas to  
18 third parties.

19 I will say that, in preparation for this conference, I  
20 was going over my notes from both our settlement conferences  
21 but then actually going all the way back to our last public  
22 conference in the summer of 2020, and this feels a little bit  
23 like Groundhog Day because it seems like we were talking about  
24 these same issues, in other words, whether there was certain  
25 discovery still to be gotten from PSG – I understand PSG is

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1 objecting – and then also, if we're talking about subpoenas  
2 there is likely some kind of objection to the breadth and the  
3 scope.

4 So, before I ask either side to speak, I just wanted  
5 to confirm the following: Because I know we've gone over a lot  
6 of ground in private on the settlement conferences, when we do  
7 talk about end clients, maybe somebody can start and talk about  
8 whether we're all on the same page as to what the definition of  
9 end client is in this context, and if it's really the discovery  
10 from the end clients about the employees and where they were  
11 placed that is really what plaintiff is trying to get at this  
12 point.

13 Mr. Costigan, you can go first. Thank you.

14 MR. COSTIGAN: Yes. This is Andrew Costigan. Thank  
15 you, your Honor.

16 Ultimately, I don't anticipate that we will need  
17 discovery from end clients. We do have a somewhat complicated  
18 chain here because PSG places its employees with end clients,  
19 some just on its own, clients of its own, and we have that  
20 production. And then there is also the issue of the majority  
21 of its employees being placed by other staffing companies with  
22 end clients of those staffing companies, and that information  
23 we don't have.

24 One complicating issue is that there's another set of  
25 employees who are placed by staffing companies who themselves

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1 were contacted by a staffing company other than PSG. And there  
2 are additional links in the chain, potentially, where an  
3 employee is essentially getting business from a staffing  
4 company other than the staffing company directly in contact  
5 with PSG and in place for that staffing company's clients.

6 THE COURT: All right.

7 How many employees are we talking about here?

8 MR. COSTIGAN: Well, it's in the ballpark of, I  
9 believe, 29,000 -- I'm sorry, 39,000, and about three-quarters  
10 of those, or about 29,000, are at issue in terms of being  
11 placed by staffing companies other than PSG.

12 THE COURT: Okay, all right.

13 Can I hear from defendants about just whether this is  
14 the general understanding of what the discovery that is still  
15 remaining, please?

16 MR. SHEV: Yes, your Honor. This is Nathan Shev, for  
17 PSG.

18 That is the general understanding. The end client is  
19 the entity that receives the staffing employee for work, and  
20 the issue is that PSG, because they don't place the staffing  
21 employee for -- they don't place all the staffing employees  
22 themselves directly; some are placed by third parties, they  
23 don't have the identities of those end clients. So that's the  
24 discovery that's being sought from the staffing company that  
25 actually made the placements.

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1 THE COURT: All right.

2 I guess my next question is: Can you tell me a little  
3 bit about the range, in terms of numbers of employees, that  
4 these other potential subpoena recipients have placed? Of the  
5 29,000, are the majority of them or a large number of them  
6 predominantly placed by two or three potential staffing  
7 companies, or is it like every potential third-party-subpoena  
8 recipient placed the same number of employees, or something  
9 else?

10 MR. SHEV: Your Honor, this is Nathan Shev again.

11 It varies by staffing clients, so some are smaller  
12 much smaller than others. At one point, we discussed issuing a  
13 smaller -- a subset of the subpoenas, having plaintiffs issue a  
14 subset of the subpoenas. For example, five staffing clients we  
15 found would account for 28 percent, roughly, of the 29,000  
16 employees. But it varies depending on what staffing client  
17 you're talking about.

18 THE COURT: Okay.

19 So, let's go back. Let's take this a little bit out  
20 of order from your status letter, which I'm hoping can resolve  
21 some of the easier stuff, because I think the subpoena issue --  
22 the forms, scope, breadth, timing all of that -- is going to be  
23 a little bit more complicated, but I understand that plaintiff  
24 is seeking more discovery from PSG? That's what I read from  
25 the letter, but from what you're telling me right now, I'm not

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1 sure that that's still on the table. If that's not on the  
2 table anymore, let's just remove it and start talking about the  
3 subpoenas.

4 MR. COSTIGAN: Your Honor, this is Andrew Costigan.  
5 It is on the table. And our view of this is, much of this  
6 discovery really should just come from PSG. Certainly, the  
7 material that they do have, they should produce instead of  
8 having --

9 THE COURT: Mr. Costigan, I'm going to interrupt you  
10 right now because this is sounding like you're reading from a  
11 transcript from last summer.

12 What is the discovery that you are seeking, or would  
13 be seeking, now from PSG? And how does that get you to an  
14 understanding of where the remaining 29,000 employees ended up  
15 getting staff?

16 MR. COSTIGAN: Well, one of the things we're looking  
17 for is the communications that PSG had with its staffing  
18 companies, staffing company customers, that relate to the  
19 employees and where they're being placed.

20 THE COURT: Okay. So why not get that from the -- I  
21 understand that we may be opening a completely different can of  
22 worms right now, but what I'm hearing is that PSG doesn't have  
23 that information but the staffing companies might. So, why is  
24 this not duplicative and maybe more complicated than trying to  
25 get that information from what we'll call PSG's staffing

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1 clients?

2 MR. COSTIGAN: This is Andrew Costigan again.

3 We're looking, in addition, for the communications  
4 that PSG had with the staffing companies when it said it was  
5 trying to get them to turn over this information.

6 THE COURT: But why? Why does that get you to the  
7 ultimate information that you're trying to get? I understand  
8 you're doing this discovery on discovery. I'm not inclined to  
9 put that in front of the information about the employees and  
10 the end clients. So you have to give me a reason why that's  
11 more important than talking about the subpoenas.

12 MR. COSTIGAN: Well, ultimately, it comes down to  
13 this: The reason we have this issue in the first place is  
14 because PSG told us, on their insurance application, that they  
15 don't place their employees with other employers or have them  
16 perform work for other businesses or subsidiaries. Obviously,  
17 the issue we're facing now wouldn't exist if those  
18 representations had been true.

19 THE COURT: Okay.

20 I thought the information that you were seeking was  
21 whether certain employees had actually been misclassified so  
22 that the premium that was calculated was actually incorrect.

23 MR. COSTIGAN: Yes, we are.

24 THE COURT: Okay. But what you're just telling me now  
25 sounds more like a breach-of-contract claim against PSG about



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1 some representations underlying the contract that you had with  
2 PSG, which seems like it wouldn't relate to where the employees  
3 were being placed.

4 MR. COSTIGAN: It doesn't relate to where the  
5 employees are being placed, but we are looking for information  
6 that explains the breach of contract, and we're looking for an  
7 explanation of PSG's corporate relationship with the companies  
8 that it represented on the insurance application were d/b/a's  
9 of itself. And we're also looking to get the communications  
10 between PSG and its insurance agent about the scope of the  
11 insurance contracts that were issued because when PSG issued  
12 insurance certificates to other staffing companies and to its  
13 own clients, it was misrepresenting the scope of the insurance,  
14 including provisions that don't exist in our policies.

15 MR. SHEV: Your Honor, may I interject?

16 THE COURT: Go ahead.

17 MR. SHEV: This is Nathan Shev.

18 Most of what I'm hearing is pretty new to me. It was  
19 not raised at all in the complaint, or in discovery, or even  
20 more recently. Much of this we're hearing for the first time  
21 now or for the first time in the past month and a half, since  
22 around the time of the settlement conference. The d/b/a issue  
23 is a brand new issue that's being raised based on policy  
24 application documents that were reviewed as part of their  
25 underwriting process, and apparently they found nothing wrong

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1 with it then.

2 And certificates of insurance? I'm not sure what that  
3 refers to. We did not discuss that.

4 It seems to me that this is an effort to broaden the  
5 scope of this case entirely and it's going beyond the premium  
6 calculation, because they're afraid it might not work out for  
7 them.

8 THE COURT: All right.

9 I have to say, this is new to me too, because I had  
10 thought that we were talking about – and had come into this  
11 conference expecting that we would be talking about – getting  
12 information on where the employees had been placed, getting  
13 basically end clients' information, so that we could have a  
14 better understanding of where, and whether, and how, premium  
15 might have been miscalculated, or had been calculated  
16 incorrectly. And I'm still not seeing how the discovery that  
17 Wesco seems to want from PSG relates to the incorrect  
18 calculation of premium, which is what we've been talking about  
19 for the last nine months.

20 So, let me take a look at what's going on.

21 I have another conference on at 11:30. What I'm going  
22 to do is, I'm going to put the parties' counsel in a breakout  
23 room for five minutes, and I'm going to bring you back. During  
24 that five minutes, you need to talk about whether you insist,  
25 plaintiff, on moving forward, whether you'd like to move

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1 forward more on the damage calculation or on this new  
2 breach-of-contract issue. I'm going to bring you back in five  
3 minutes, without warning. I just want to hear what, if  
4 anything, you've been able to reach. Okay?

5 (Recess)

6 THE COURT: Mr. Costigan, it's your case. What did  
7 you decide? What have you been able to work out with defense  
8 counsel?

9 MR. COSTIGAN: We discussed it. Wesco's position is  
10 that it would make sense to proceed with discovery of PSG  
11 first, which would have the benefit, somewhat at least, of  
12 narrowing the subpoenas. PSG's position is that we should  
13 focus solely on the subpoenas.

14 THE COURT: Okay. Just a minute.

15 (Pause)

16 THE COURT: Mr. Shev or Mr. Regelman, can you  
17 respond? Are there allegations in the complaint that actually  
18 speak to this issue?

19 MR. SHEV: Your Honor, this is Nathan Shev.

20 There are not allegations in the complaint that speak  
21 to this issue. The complaint is about the data that's needed,  
22 or that plaintiffs say is needed, to complete a premium audit.  
23 And it does not go into other alternative claims,  
24 breach-of-contract claims or other state law claims. That's  
25 not part of the case. So, PSG's view is that we should address

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1 the case that we have. Party discovery closed in 2019, so, our  
2 view is what we've been saying all along – we've been trying to  
3 address and resolve how to get the end client data, and we  
4 should be focusing on getting that.

5 MR. COSTIGAN: Your Honor, if I may address that –  
6 this is Andrew Costigan – at the time that we filed our  
7 complaint, the status between the parties was that we were  
8 trying to audit PSG, and PSG just flat out refused. We didn't  
9 have anything like the amount of information that we have  
10 today. In particular, we wouldn't have known that we had the  
11 issue that we have today, which is trying to obtain client  
12 information from companies that were represented as PSG d/b/a's  
13 but turned out to be just independent companies.

14 THE COURT: Okay. But I guess if the breach of  
15 contract is the failure to pay premium, I'm just wondering  
16 whether this is getting you into a motion to amend.

17 MR. COSTIGAN: It likely is, your Honor, although  
18 there is an impact on premium in that the insurance company, in  
19 setting the premium -- there's a reason they ask the questions  
20 on the application, because they are of some significance to  
21 it, and there were two questions that related directly to this  
22 issue, and PSG said, on both, it doesn't place its employees  
23 with other companies.

24 THE COURT: Okay, all right.

25 It looks like the parties for my 11:30 are on the

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1 line. Here's what I'm going to need to do. I'm not going to  
2 put you in a huge time crunch, Mr. Costigan, but I would like  
3 to see a three-page letter filed on the docket basically  
4 setting forth your position whether you intend to file a motion  
5 to amend the complaint. Okay?

6 MR. COSTIGAN: Yes.

7 THE COURT: Because this is the discovery that you're  
8 now seeking, which is not what we had been talking about  
9 sometime ago, this is new to me. So, three pages,  
10 single-spaced letter, to be filed on the docket. There will be  
11 no discovery proceeding during this time. Okay?

12 After I see the letter, I will take a look at the  
13 complaint, take a look at your position, Mr. Costigan, and then  
14 I think only after that will I either tell you to go forward  
15 with your motion to amend or I might invite a short response  
16 from defense counsel, but I'm not, at this moment, inviting a  
17 response from defense counsel. Okay?

18 Throughout this time, I direct you to keep the lines  
19 of communication open. If your views change at some point in  
20 time, you can also write a letter into the Court and say, you  
21 know what, we've discussed it, we've decided that we'd rather  
22 proceed with the subpoenas instead of direct discovery from  
23 PSG; that's fine, we'll have another conference, we'll talk  
24 about the subpoenas. So, I definitely encourage you to keep  
25 the lines of communication open.

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1 I also wanted to say that I am also available to have  
2 further settlement conferences, but right now it seems like  
3 there is a fundamental disagreement about the direction the  
4 parties should be taking going forward, and I'd like to have  
5 that resolved or figured out before we start spending big  
6 dollars on discovery. Okay?

7 MR. COSTIGAN: Yes, yes, your Honor.

8 THE COURT: Okay, Mr. Costigan, how much time do you  
9 need to write that letter?

10 MR. COSTIGAN: May I have until March 9?

11 THE COURT: Sure, not a problem. March 9th.

12 No response is due from defendants at this time. I  
13 will take a look at what the letter says. And then look for an  
14 order on the docket. Okay?

15 MR. COSTIGAN: Yes. Thank you, your Honor.

16 MR. SHEV: Thank you, your Honor.

17 THE COURT: Thank you very much. We are adjourned.

18 \* \* \*